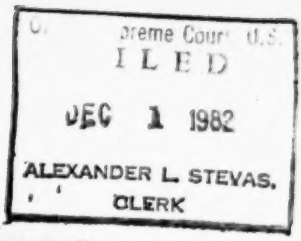
82-906



IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER, 1982 TERM

DONALD WAYNE HOWARD,

Petitioner,

vs.

THE STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

Douglas W. Thomson
THOMSON & HAWKINS
Suite 1530
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-0856

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court misapplied the rule in Edwards v. Arizona, in holding that Petitioner did not clearly assert his right to counsel and did not express a desire to deal with police only through counsel where Petitioner stated, during custodial interrogation, "I don't think I'd better say anymore - til I have an attorney." and the following day during reinterrogation asked, "Why don't I have an attorney here now?"

2. Whether the Minnesota Supreme Court erred in not applying Payton v. New York retroactively as required by United States v. Johnson, where Petitioner's case was pending direct appeal when Payton was decided and where Petitioner's warrantless arrest occurred at his home, at night, absent exigent circumstances.

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THE STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioner, Donald Wayne Howard, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Minnesota Supreme Court entered in this proceeding on August 31, 1982.

OPINION BELOW

The Opinion in the Minnesota Supreme Court, not yet reported, appears in

Appendix A.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on August 31, 1982. A timely motion for a rehearing was denied by the Minnesota Supreme Court on October 4, 1982 (Appendix B), and this petition was filed within sixty days of that date. Petitioner's conviction and sentence having become final, this Court's jurisdiction is invoked under 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court misapplied the rule in Edwards v. Arizona, in holding that Petitioner did not clearly assert his right to counsel and did not express a desire to deal with police only through counsel where Petitioner stated, during custodial interrogation, "I don't think I'd better say anymore - til I have an attorney." and the following day during reinterrogation asked, "Why don't I have

an attorney here now? "

2. Whether the Minnesota Supreme Court erred in not applying Payton v. New York retroactively as required by United States v. Johnson, where Petitioner's case was pending direct appeal when Payton was decided and where Petitioner's warrantless arrest occurred at his home, at night, absent exigent circumstances.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment XIV: "... nor shall any state deprive any person of life, liberty, or property, without due process of law,..."
>
> Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated,..."
>
> Amendment V: "No person ... shall be compelled in any criminal case to be a witness against himself..."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public

> trial, by an impartial jury ... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT

Petitioner, Donald Wayne Howard, was indicted for murder in the first degree, in violation of Minn. Stat. §609.185(1) and conspiracy-to-commit-murder in violation of Minn. Stat. §609.175, Subd. 2(2). Petitioner was accused of hiring Bruce Webber to kill his wife, Shirleen Howard. Petitioner was tried by a jury on January 31, 1978, and was convicted on both counts.

Petitioner sought post-conviction relief from the trial court pursuant to Minn. Stat. §590.01 Subd. 3.[1/] Petitioner

---

1/ Minn. Stat. §590.01 Subd. 3 provides, "A person who has been convicted and sentenced for a crime committed before May 1, 1980, may institute a proceeding applying for relief under this chapter upon the ground that a significant change in substantive or procedural law has occurred which, in the interests of justice, should be applied retroactively, including re-sentencing under subsequent enacted law."

requested that his conviction be set aside or that he be granted a new trial. Petitioner based his request for post-conviction relief, in part, upon this Court's then-recent holding in Payton v. New York, 445 U.S. 370 (1980). Memorandum of Law in Support of Petition for Post-Conviction Relief, pp. 3-9. Petitioner's request for post-conviction relief was granted in part and denied in part on May 27, 1981. The trial court granted Petitioner's request to vacate his conviction of conspiracy-to commit-murder as a lesser included crime. Petitioner's Petition for Post-Conviction Relief based upon the Payton v. New York issue was denied. The trial court declined to apply Payton v. New York retroactively but noted that "[i]f Payton was so applied (retroactively), it would probably result in petitioner's conviction being vacated." (Memorandum attached to the Findings of

Fact, Conclusions of Law and Order, page 5). Petitioner appealed the order denying, in part, his request for post-conviction relief and made a motion to the Minnesota Supreme Court to reinstate his appeal on the merits. Petitioner's motion to reinstate his appeal was granted by the Minnesota Supreme Court on September 2, 1981. The Minnesota Supreme Court affirmed Petitioner's conviction upon review of the merits. See Appendix A.

Petitioner requested rehearing by the Minnesota Supreme Court and specifically asked that the Minnesota Court review the issue of whether Payton v. New York, 445 U.S. 573 (1980), applied retroactively pursuant to United States v. Johnson, ___ U.S. ___, 73 L.ed.2d 202 (1982), would result in the suppression of Petitioner's confession. See Appendix B, Petition for Rehearing. At the time of Petitioner's

request for rehearing, United States v. Johnson, supra, was in direct conflict with the Minnesota Court's holdings that Payton was not to be applied retroactively. Petitioner's request for rehearing was summarily denied. See Appendix C.

A brief summary of the facts relevant to the issues presented to the Court here are as follows:

On August 13, 1977, Petitioner returned home from shopping with his two daughters at approximately 9:15 p.m. and found his wife shot to death in the basement of their home (T. 145, 2629-2630).[2/] Shirleen Howard's death was caused by two bullet wounds to the head (T. 1451). When police arrived they searched Petitioner's home (O.T. 11, 12)[3/]

2/ T. refers to trial transcript.

3/ O.T. refers to Omnibus Hearing transcript.

Police officers investigating the death of Petitioner's wife made numerous trips to Petitioner's home and spoke with Petitioner on several occasions in the days following Shirleen Howard's death (O.T. 21, 22, 29, 31, 100, 101, 102, 165, 166). Petitioner was at all times cooperative and on several occasions, indicated his willingness to assist in the investigation (O.T. 32, 100, 101, 165, 176).

Petitioner was arrested at his home ten days after his wife was found shot to death in their home. On August 23, 1977, Raymond Riniker, wired with a recording device, spoke with Petitioner at his home at approximately 9:22 p.m. (T. 2449). At that time, Petitioner made the following statement to Riniker which was overheard by police officers:

> I come home and that's what I found. He was planning an

> accident. I was so goddamn mad-and it was gruesome.

(T. 2449-2453). Within minutes after Riniker left Petitioner's home, police officers arrived and placed Petitioner under arrest (T. 2455). The officers did not have an warrant for Petitioner's arrest. Petitioner was advised of his Miranda rights.

Upon arrival at the Winona Police Station, Ageny Rysavy of the Minnesota Bureau of Criminal Apprehension began interrogating Petitioner. Interrogation of Petitioner resumed the following day, August 24, 1977. See Appendix A for relevant portions of the interrogation.

REASONS FOR GRANTING CERTIORARI

A. The Illegal Interrogation

Two custodial interrogations of Petitioner, fairly construed, reveal six instances at which the police violated Petitioner's right to counsel and his right

to remain silent according to this Court's holdings in Miranda v. Arizona, 384 U.S. 436 (1966) and Edwards v. Arizona, 451 U.S. 477 (1981). The Minnesota Supreme Court misapplied Edwards in the present case and erred in holding Petitioner had made a "knowing and intelligent" waiver of his right to counsel as stated by this Court in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Accord Edwards v. Arizona, 451 U.S. 477, 483 (1981).

In Edwards, this Court announced the following:

> [A]n accused, such as Edwards having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 485. This language has been interpreted as a per se rule. Clark v. Jagon, 676 F.2d 1099, 1111-13 (6th Cir.

1982); Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982). See also, Note, A Ban on Police-Initiated Interrogation Following an Accused's Invocation of His Right to Counsel, 23 Ariz. L.Rev. 1391-1403 (1981); Note, Edwards v. Arizona, The Burger Court Breathes New Life into Miranda, 69 Calif. L. Rev. 1734-1754 (1981); Note, Criminal Procedure-Self-Incrimination: Miranda Lives, 33 Fla. L. Rev. 788-798 (1981); Criminal Law, 95 Har. L. Rev. 112-132 (1981); Note, Fifth Amendment--Waiver of Previously Invoked Right to Counsel, 72 Crim. L. & Criminology, 1288-1306 (1981). But see the dissents in both Edwards v. Arizona, 451 U.S. 477 at 489-92, and State v. Howard, No. 81-735, slip op. at CS-1 (Minn. 1981).

In the present case, the Minnesota Supreme Court holds that the incriminating

August 24th statement was property admitted even though:

> The meeting and conversation was not initiated by Appellant, and therefore, was in violation of Edwards if Appellant had "expressed his desire to deal with the police only through counsel" the night before. Edwards, at 484.
>
> Respondent contends that Appellant did not clearly assert his right to counsel nor did he express a desire to deal with police only through counsel. We agree.

State v. Howard, No. 81-735, slip op. at 10 (Minn. 1982).

Petitioner agrees with the Minnesota Supreme Court that the police initiated the meeting and interrogation on August 24. Petitioner disagrees with the Minnesota Supreme Court that he failed to make a clear assertion of his desire to deal with the police only through counsel the night before. The Minnesota Supreme Court found that four statements made by Petitioner

during the August 23 interrogation construed "as a whole" did not constitute a request for counsel. The critical passage of this interrogation is reprinted in the Minnesota Supreme Court's opinion in Appendix A.

Petitioner's first of four consecutive statements is, "I don't think I'd better say anymore--til I have an attorney." Once the Petitioner made this clear assertion of his desire to deal with the police only through counsel, then further interrogation was in violation of Edwards. The Minnesota Supreme Court should not have considered the remainder of the interrogation in determining whether Petitoner's assertion was clear. Only if Petitioner's initial assertion of his right to counsel was equivocal or unclear can the interrogator ask further questions to clarify an accused's assertion. See Silva v. Estelle, 672 F.2d 457, 459 (5th Cir. 1982); Blasingame v.

Estelle, 604 F.2d 893 (5th Cir. 1979); Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) (en banc). Petitioner's assertion was not equivocal or unclear within the meaning of these cases.

The interrogator's next question was, "Do you want to end our conversation?" Petitioner responded, "I'll talk as long as you want to, but--." Petitioner was about to add a qualification to his second statement when the interrogator cut him off. Petitioner might have meant to say, "..., but not until I have counsel," or "..., but not about the murder or anything that can be used against me."

The interrogator's next statement is, "Well, you just said you didn't want to say anymore til you had an attorney." Petitioner's response is, "Well, I guess I won't make any conversation." Petitioner's response reasserted his right to remain

silent and implicitly ratified his request for counsel. For the third time, in violation of Edwards, the interrogator continued to question Petitioner after Petitioner requested an end to the interrogation.

The interrogator's next question was, "Do you recall when we first started and I advised you of your rights, the last thing I said to you-we could stop talking at any time during our conversation if you'd just say so. Is this that time?" Petitioner's response is, "I guess so, yeah." Petitioner reasserts his desire to terminate the interrogation but the interrogator continued to question Petitioner, in violation of Edwards, for two more pages in the original transcript. Petitioner's fourth response cannot be interpreted as, "I'm not sure, yeah." Rather, Petitioner's fourth response should be read, "In my

best judgment, yeah, I desire to deal with the police only through counsel." If Petitioner was equivocal, then he would not have added the word "yeah."

The interrogator then suggests that Petitioner consider rescinding the assertion of his rights, "You think it is. You want to think on it. All right, Don, not just so that I have the last word or anything - do you feel that I've lied to you at any time during our conversation."

The record shows no evidence that Petitioner responded affirmatively or negatively to the interrogator's suggestion, "to think on it" but interrogation continued. If the interrogator honestly believed that Petitioner wished to reconsider whether he wanted to terminate the interrogation, then the interrogator should not have continued to ask for incriminating information without giving Petitioner time to think. In

any case of interrogation, the interrogator could ask an accused to think about talking to the police at a later time. The accused is likely to say "sure" to such a seemingly innocuous request. An interrogator should not be able to eviscerate the protection of the Edwards rule so easily.

The Minnesota Supreme Court construed the entire passage as a whole and held that Petitioner had not clearly asserted his desire to deal with the police only through counsel. Construing the passage as a whole conflicts with Edwards, because once Petitioner clearly asserts his desire to deal with the police only through counsel, then further questioning is irrelevant. An interrogator should not have an opportunity to subtly coerce the accused into retracting a clear assertion of his rights. The Edwards rule was specifically designed to prevent subtle coercion. The Minnesota Supreme

Court, therefore, misapplied Edwards in the present case.

Petitioner is not an attorney and would not know that the magic words are, "I desire to deal with the police only through counsel." Petitioner's initial assertion of his right to counsel was clear and unequivocal. See Stumes v. Solem, 671 F.2d 1150, at 1153 (8th Cir. 1982) (The accused's assertion that "I would rather not talk about it any more at this time until I talk to my attorney and after that I'll give you a full statement in regard to her death." The accused's statement is a clear assertion under the Edwards rule). Furthermore, Petitioner's statements, even if construed as a whole, evidence a clear and unequivocal assertion of his desire to deal with the police only through counsel.

After the interrogation finally ended,

Petitioner was taken to a cell for the night. Between the August 23 and August 24 interrogations, Petitioner initiated two unrecorded comments to the police. First, sometime during the night, officers delivered a copy of Petitioner's statement to him in his cell. During this delivery, the Petitioner said, "I must be really sick, huh?" (T. 1996; O.T. 129). The officers did not interrogate Petitioner at this time. Second, about 9:00 in the morning, officers again approached Petitioner's cell. This time the officers intended to ask Petitioner to give a statement. When the officers approached, Petitioner awoke and apparently the first words spoken were his. He inquired about who was caring for his daughters. Petitioner was told that his daughters were fine and then he was asked if he would give a statement. Petitioner agreed. This police-

initiated interrogation is a violation of Petitioner's right to counsel and to remain silent.

The Minnesota Supreme Court holds that the August 24 "meeting and conversation" was police-initiated. The two comments initiated by Petitioner, therefore, were insufficient to invite further police interrogation under Edwards. With these two comments, however, this Court has an excellent opportunity to clarify the first two of the following three issues concerning the Edwards rule:

> [I]t is not clear from the [Edwards] decision: 1) Whether police may initiate interrogation of an accused any time after he initiates further conversation or whether the two events must be proximate in time; 2) whether the exchange in which an accused initiates conversation must be related to the subject matter of the crime for which he had been arrested in order for police to be free to question him; 3) whether police, in a Mosely-type situation, may question

> an accused, who has requested counsel, about a crime that is totally unrelated to the original offense for which he had been arrested.

Note, Edwards v. Arizona, The Burger Court Breathes New Life into Miranda, 69 Calif. L. Rev. 1734, at 1403 (1981). Cf. Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982).

The police began the August 24 interrogation by reading to Petitioner his Miranda rights. A tape recording was running. Four officers, including the interrogating agent from the previous night, were expectantly awaiting his statement, but Petitioner had a confused understanding of his rights. Petitioner asked, "Why don't I have an attorney here now." The interrogating officers response was, "Why don't you? Ah, would you rather have one present during our questioning?" Petitioner responded, "Well, ah, no, I guess not,..." (Transcript of August 24 statement at 1).

The interrogating officer's response, "Why don't you ..." implies to Petitioner that it was Petitioner's own fault if an attorney was not present. Under the circumstances, Petitioner's desire to insist on an attorney may have been overcome. This is the fifth instance in which the police violated Petitioner's right to counsel.

Petitioner may have wanted an attorney present for a number of reasons. For example, he may have wanted representation while making his statement or he may have wanted to consult an attorney before finally deciding to give any statement at all. The interrogation reveals that Petitioner still had reasonable doubts that he was responsible for the murder at all. (Transcript of August 24th statement at 12).

When Petitioner agreed to give his statement, he had not yet made any attempt to contact an attorney, nor had the police

explicitly offered him the opportunity to use a phone to contact one. Petitioner's failure to obtain an attorney at this time is quite understandable. Petitioner had been arrested long after the close of business hours the night before and he was sleeping in the morning until the police awakened him about 9:00 a.m.

Although Petitioner had employed a business lawyer several times, Petitioner does not appear to be sophisticated about the law. On the contrary, Petitioner seems to have misunderstood his Miranda rights. Petitioner had clearly asserted his desire to deal with the police only through counsel the previous night. Petitioner may have thought, therefore, that the state would provide him with an attorney upon any reinterrogation. Alternatively, Petitioner may have thought he was an indigent. Petitioner explicitly

indicates near the end of the August 24 interrogation that he was financially stretched thin with debt. (Transcript of August 24 statement at 13).

In the middle of the August 24 interrogation, Petitioner's confusion about his Miranda rights is even more apparent. Twenty-eight minutes into the interrogation, the recorder was shut off at Petitioner's request. Petitioner asked, "When can I have an attorney?" (O.T. 60). Petitioner inquired as to a court appointed attorney. Rysavy said, "They probably shouldn't discuss that," since it was a matter for the court to determine (O.T. Prosecution's Exh. 5, p. 11; O.T. 58-63). Rysavy's response and the repeated request for a statement by the police on August 23 and 24 implied that the police were free to keep asking Petitioner to give a statement until some time in the future when a court might appoint counsel. Petitioner's desire to wait for

counsel, therefore, may have been discouraged. Petitioner agreed to continute the interrogation, but his decision to continue the interrogation was not a "knowing and intelligent" wavier of his right to counsel as announced in Zerbst. The police therefore, violated Petitioner's right to counsel for the sixth time in two days.

The statement Petitioner subsequently completed was an essential element in his eventual conviction. The statement lead to the arrest of the actual killer and linked Petitioner to the murderer. Without this incriminating statement and its fruits, proof of the Petitioner's link to the actual murder is not nearly so strong. Admitting the statement into evidence, therefore, was not harmless error. See Justice Peterson's opinion in State v. Howard, No. 81-735, slip op. at CS-1-4 (Minn. 1982).

This Court should grant certiorari in

this case, because in our system of jurisprudence, individuals in like circumstances should be treated equally. Petitioner was not treated equally as defendants in other cases under the Edwards rule. Also, this case presents this Court with an excellent opportunity to clarify and refine Edwards.

If this Court does not grant certiorari in this case, the Minnesota precedent will allow the police great freedom to engage in abusive and subtly manipulative coercion of an accused to initiate interrogation after the accused has clearly asserted his right to deal with the police only through counsel. Absent blanket prohibitions, such as in Edwards, police abuse of the Miranda rights is likely.

> Absent such blanket prohibitions, police are likely to legitimize any effective tactic not expressly banned, and to 'push to the limit'

> any constitutional restraint on their actions.

Note, Edwards v. Arizona, The Burger Court Breathes New Life into Miranda, 69 Calif. L. Rev. 1734, at 1744 (1981).

Edwards is a good workable rule that clarifies and reaffirms Miranda. A failure to grant certiorari in this case would begin a new era of confusion in Minnesota and perhaps the country on the meaning of Miranda.

B. The Illegal Arrest

On January 21, 1982, this Court applied its ruling in Payton v. New York, 445 U.S. 573 (1980) retroactively to convictions not yet final. United States v. Johnson, ___ U.S. ____, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). This Court's decision decision changed the case law of Minnesota which did not apply Payton retroactively. Watts v. State, 305 N.W.2d 860, 862 (Minn. 1981); State v. Smith, 305 N.W.2d 798, 798-99

(Minn. 1981); and State v. Gant, 305 N.W.2d 790, 791 (Minn. 1981).

The Minnesota Supreme Court erred in not addressing the retroactive application of Payton in Petitioner's case. At the time Payton was decided, Petitioner's conviction was not yet final. Payton v. New York, was decided on April 15, 1980. Petitioner's original appeal to the Minnesota Supreme Court was dismissed by that Court on August 18, 1980, four months after Payton was decided. Petitioner requested that his appeal on the merits be reinstated and on September 2, 1981, the court ordered that Petitioner's appeal be reinstated. See Appendix D.

Even if it could be argued that Petitioner's conviction became final when the Minnesota Supreme Court dismissed his original appeal on August 18, 1980, that "final" conviction was un-finalized when

the Minnesota Court reinstated Petitioner's original appeal. Petitioner's original appeal was pending on April 15, 1980, when Payton was decided.

In Payton, this Court held the Fourth Amendment prohibited police from making a warrantless and nonconsenual entry into a suspect's home to make a routine felony arrest absent exigent circumstances. Because of the applicability of Payton to Petitioner's warrantless arrest, the ruling was presented to the trial court as a ground for granting his petition for post-conviction relief on February 19, 1981.

In Petitioner's memorandum in support of his petition for post-conviction relief, he argued that under the holding of Payton v. New York, supra, his warrantless arrest inside his home was patently illegal; that the statements derived from his illegal arrest were tained and should have been

suppressed. Petitioner also argued there were no exigent circumstances at the time he was arrested. He had been in the Winona area since the death of his wife. There was no indication he was attempting to flee the jurisdiction, avoid arrest, or destroy evidence.

On May 27, 1981, the trial court denied that portion of Petitioner's petition for post-conviction relief based upon the Payton v. New York issue. In the Memorandum of Law attached to the Order denying post-conviction relief, the applicability of Payton v. New York was discussed. The Court declined to apply Payton v. New York retroactively in accordance with the Minnesota Supreme Court's decisions of State v. Gant, 305 N.W.2d 790, 791 (Minn. 1981); Watts v. State, 305 N.W.2d 860, 862 (Minn. 1981); and State v. Smith, 305 N.W.2d 798, 798-99 (1981), but noted that "[i]f Payton

was so applied (retroactively), it would probably result in petitioner's conviction being vacated." (Memorandum attached to the Findings of Fact, Conclusions of Law and Order, page 5).

Petitioner did not raise the applicability of Payton v. New York, supra, to his case on his reinstated appeal because of that court's firm position that Payton not be applied retroactively. See, State v. Hinkle, 310 N.W.2d 97, 99 (Minn. 1981). The Minnesota Supreme Court has since overruled this entire line of cases to the extent they are inconsistent with Johnson v. United States, ___ U.S. ___, 73 L.Ed.2d 202 (1982). State v. Hatcher, 322 N.W.2d 210, at 216 (Minn. 1982). Before the Minnesota Supreme Court handed down its decision on Petitioner's appeal, Petitioner again raised the Payton issue in a Motion and Memorandum for Leave to Include a

Supplemental Brief. Petitioner's motion was precipitated by this Court's decision in United States v. Johnson, ___U.S.___, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). The Minnesota Supreme Court did not rule on Petitioner's motion to file a supplemental brief and the court's decision did not address the Payton issue. See Appendix A. Petitioner again raised the Payton issue in his Petition for Rehearing. This Court's decision in United States v. Johnson, supra, applying Payton retroactively added a significant issue to Petitioner's appeal. In Johnson, the defendant was arrested at his home, without a warrant, and interrogated after being advised of his consitutional rights. He confessed. The confession was suppressed. Here, Petitioner was arrested, without a warrant, at his home, was advised of his rights, and later confessed. His confession

should be suppressed applying the Payton and Johnson analysis.

Given the trial court's statement that retroactive application of Payton v. New York, supra, would "probably result in [Petitioner's] conviction being vacated," this Court should grant certiorari on the retroactive applicability of Payton v. New York to Petitioner's arrest and resulting confession.

This Court may grant certiorari because the so-called "surprise" case is involved. See Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, (1929). See also Stern and Gressman, Supreme Court Practice at 221-22, 224 (Fifth Ed. 1978). Before Johnson, Petitioner could not reasonably have been expected to anticipate a Minnesota case holding Payton must be applied retroactively. See State v. Hatcher, 322 N.W.2d 210, 216 (Minn. 1982).

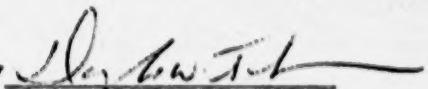
The Minnesota Supreme Court denied the petition for rehearing and avoided the Payton issue in Petitioner's case. The United States Supreme Court should also grant certiorari so that the Petitioner will be treated the same under Payton and Johnson as similarly situated Defendants. See Johnson, at 2594.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

THOMSON & HAWKINS

By 

DOUGLAS W. THOMSON
Suite 1530
55 East Fifth Street
St. Paul, Minnesota
55101
(612) 227-0856

Counsel for Petitioner

Winona County

Scott, J.
Concurring Specially,
Peterson, J.,
Amdahl, C.J.
Took no part,
Kelley, J.

State of Minnesota,

Respondent,

vs. 48620, 81-735

Donald Wayne Howard,

Appellant.

Endorsed
Filed August 31, 1982
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

1. Appellant was not denied his due-process right to a fair and impartial jury where there was no showing that the jury was predisposed to convict appellant.

2. Appellant did not clearly express his desire to deal with police only through counsel, and even assuming he did and his confession was therefore improperly admitted, the admission was harmless error.

3. Appellant's conspiracy to commit murder was not yet complete while the fee was unpaid; consequently, the statements made by appellant's co-conspirator were

not hearsay.

4. The admission of items seized during the search of appellant's home was harmless error, if error at all.

5. The consent given by Raymond Riniker to have his conversation with appellant taped was freely given, and the conversation was properly admitted.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

SCOTT, Justice.

This appeal of the partial denial of post-conviction relief in the case of the conviction of appellant for murder in the first degree. The trial judge denied in part the petition for post-conviction relief. The conspiracy-to-commit-murder conviction was vacated as a lesser-included offense. See Minn. Stat. § 609.04 (1980).

This is the second time we have been

asked to review the conviction of a defendant charged in the killing of Shirleen Howard. The first occasion is set out in State v. Webber, 292 N.W.2d 5 (Minn. 1980) wherein we upheld the conviction of Bruce Webber. In this case we affirm the conviction of the man accused of hiring Bruce Webber to kill Shirleen Howard.

Shirleen Howard's body was discovered by her husband, the appellant Donald Howard (hereafter Howard), on Saturday, August 13, 1977, at approximately 9:15-9:20 p.m. in the basement of the Howard home. Mrs. Howard was found with two gunshot wounds in her head, and she had just been shot. Nothing in the home was disturbed or missing. Bruce Webber was convicted of committing the murder, and Howard was convicted of first degree murder for hiring Webber to do the killing.

After discovering his wife's body, Howard took his children to the next-door

neighbor's home, and the police were called. The police arrived at 9:23 and began searching for clues. A .45 caliber bullet and a .45 caliber casing were found near the body. The rest of the home was searched, and some articles and pamphlets on the subject of marital difficulties were found in the master bedroom. Two days later the police returned to the scene and appellant assisted the officers in their investigation.

The prosecution's firearms identification expert concluded that the bullets found at the crime scene were in all likelihood fired from a Llama firearm. Gun records from Howard's Coast to Coast store indicated that five guns, including a .45 Llama, were transferred to Webber.

The day after the killing a friend of Howard, Charles Murphy, called police, and on Monday, spoke to them. Murphy testified at trial that he described to police how in

August 1976 Howard had offered him a total of $4,000 to kill Shirleen Howard. Murphy refused, but over a period of months Howard sent Murphy messages that could be interpreted as renewals of his original request to Murphy.

Police learned of another individual whom Howard contacted for the purpose of killing his wife. Police contacted Raymond Riniker, a former classmate of Howard, and met with him on August 18, 1977. Riniker also related conversations with Howard where he was offered money to kill Howard's wife. Howard gave Riniker $1,000 and offered to supply a gun. In March of 1977 Riniker called Howard to tell him he had changed his mind.

Rinker further testified that he stopped by Howard's store in the summer of 1977 and observed Howard meeting with a third party. After the third person left, Riniker asked Howard if that was the indi-

vidual who was suppose to kill his wife. Howard said he had paid the man, a resident of Joliet, Illinois (Webber's residence), $2,000, and had given him an archery bow and a gun. In the course of their investigation the police established through telephone records that numerous phone calls were placed from Howard's store and home to Webber's home prior to Howard's arrest. As late as August 7, Howard offered Riniker a motorhome as payment for the killing.

On August 23, 1977, arrangements were made to monitor a telephone conversation between Riniker and Howard. A meeting was arranged for later that day, and Riniker consented to allow police to bug the conversation. Police then stationed themselves outside the Howard home where they listened to the conversation. Howard told Riniker:

> Butch, don't worry * * *. Listen, let me tell you what happened. This

guy-I told you he had backed off. He didn't seem to want to do it. He called me up and he said, "Do you still want to do that?" and I said, "Yeah." I said O.K. I come home and that's what I found. He was planning an accident, it was suppose to be an accident. I was so God damn mad-and it was gruesome.

After Riniker left, police arrested Howard. Police advised Howard of his rights, but he did talk with officers, essentially denying any complicity in the killing. The following day, August 24, police questioned Howard again, and during that conversation he confessed. He admitted paying Webber $2,000 and merchandise. He also disclosed that on the preceding morning he had mailed Webber a certified package containing $1,500 and a diamond ring.

Webber was arrested on August 26 in Joliet, Illinois, just after he received the package containing the money and ring sent by Howard. Subsequent investigation revealed several personal contacts between

Webber and Howard, including a meeting on August 12, 1977, the day before the murder.

Near the end of October, 1977, Howard escaped from the Winona County Jail. He was apprehended with Nancy Brown in Louisiana on October 31, 1977.

Howard took the stand and denied hiring Webber. His defense was that his conversations with Murphy and Riniker concerning killing Shirleen Howard were conducted in jest. The same reasoning applied, Howard testified, to his conversations with Jerry Sorenson where the topic of killing his wife arose. He testified that the ring and money were sent to Webber because Webber had threatened him. He explained his admissions to police as fabrications motivated by a desire to keep Webber off the streets and away from his family.

The appeal presents the following issues for resolution:

(1) Whether appellant was denied his due-process right to a fair and impartial jury; (2) whether the use of appellant's statements against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation; (3) whether the statements made by appellant's codefendant after the murder were properly admitted; (4) whether the evidence seized during a search of appellant's home on the night of the murder violated appellant's Fourth Amendment rights; and (5) whether the taped conversation between appellant and Raymond Riniker was properly admitted.

1. Appellant request a new trial because some member of his jury were aware that his codefendant, Bruce Webber, had already been convicted of the murder of Shirleen Howard. Appellant contends that this knowledge prevented the jurors from presuming appellant's innocence because

the conviction of the codefendant inescapably invited the jury to believe that Webber's guilt implied appellant's guilt. Respondent urges this court to deny appellant's request, and argues that there was no showing of partiality by the jury or, alternatively, that appellant waived his right to object to the seating of jurors who had been exposed to pretrial publicity.

The voir dire process consumed six and one-half days, during which time fifty-one jurors were examined. Each of the jurors and alternates who indicated that they had knowledge of Webber's conviction testified that their knowledge would not influence their decision in appellant's case. Respondent points out that appellant passed most of the jurros who possessed what he now regards as patently prejudicial information without challenging for cause or exercising a peremptory challenge. In

the case, for example, of the fourth prospective juror, the fact of the prior conviction was revealed by appellant's attorney and the juror was accepted by appellant.

In State v. Krampotich, 282 Minn. 182, 163 N.W.2d 772 (1968), this court found a waiver of the right to challenge a jury panel where that panel was aware of a related prior conviction. However, Krampotich is not quite as close an analogy as respondent suggests. Appellant in this case made several motions prior to the final impanelment of the jury to have all those with knoweldge of the Webber conviction struck for cause. Counsel in Krampotich deliberately sought to seat the jurors who had found favorably in an earlier trial on his case; therefore, the waiver was much clearer.

Assuming, arguendo, that there was no waiver, appellant still falls short of establishing that the jury was predisposed to

convict. In State v. Breier, 263 N.W.2d 622 (Minn. 1978), this court said:

> In order to successfully challenge a juror for cause under Rule 26.02, subd. 5, in a case involving pretrial publicity, the defendant must do more than elicit an admission from the potential juror that he has been exposed to pretrial publicity. The test is whether the potential juror exposed to such publicity demonstrates to the satisfaction of the court that he can set aside preconceptions and render an impartial verdict.

Id. at 626. Cf. State v. Webber, 292 N.W.2d 5, 12 (Minn. 1980) (pretrial publicity as it affects venue). In this case the jurors were repeatedly tested and admonished concerning their impartiality. It was noted in Beier 263 N.W.2d at 627, that "[s]ince the trial court heard the testimony of the three jurors and observed their demeanor, he was in a better position than we are to decide whether they were telling the truth when they testified that their knowledge of the other charges had not affected their thinking."

Appellant's citation to Irvin v. Dowd, 366 U.S. 717 (1961), is not helpful to his arguement because the egregious facts of Irvin (eight of the twelve jurors believed the accused was guilty) stand in sharp contrast to this case. If, as here, the jurors indicate their intention to set aside any preconceived notions, and demonstrate to the satisfaction of the trial judge that they are able to do so, this court will not lightly substitute its own judgment. See United States v. Radetsky, 535 F.2d 556 (10th CIr. 1976), cert. denied 429 U.S. 820 (1976).

2. The issue concerning whether the use of the appellant's statements against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation is the most difficult issue presented by the appeal. On August 23, 1977, when appellant was arrested, Officer

Rysavy questioned him concerning the homicide. Appellant was evasive, and made no admissions concerning any involvement on his part in the killing of his wife. Near the end of the August 23 conversation the police revealed that they had recorded appellant's conversation with Raymond Riniker just prior to his arrest. In that conversation appellant had implicated himself in the homicide.

Following the revelation of the recorded conversation appellant refused to talk further. The relevant portion of the transcript is set out below:

> DH: I can't tell you any more.
>
> RWR: You can't or you won't?
>
> DH: I can't-'cause i don't know actually who done it.
>
> RWR: Tell me what transpired. You realize if you tell me the whole store [sic] you're going to involve yourself all the more. I told you the evidence that we've accumulated and I think you'll agree that we've done fairly good.

DH: I don't think I better say anymore-till I have any attorney.

RWR: Do you want to end our conversation now?

DH: I'll talk as long as you want to, but * * * *

RWR: Well, you just said you didn't want to say anymore till you had an attorney.

DH: Well I guess I won't make any conversation.

RWR: Do you recall when we first started and I advised you of your rights, the last thing I said to you-we could stop talking at anytime during our conversation if you'd just say so. Is this that time?

DH: I guess so, yeah.

RWR: You think it is. You want to think on it. All right, Don, not just so that I have the last word or anything-do you feel that I've lied to you at anytime during our conversation?

DH: I think you're guessing.

After some further comments by the officer concerning the strength of their evidence, the interrogation of appellant ceased.

The next day, August 24, two officers went to appellant's cell. One of the officers testified at the omnibus hearing that:

> I explained that I was interested in getting more information in regard to the person that actually pulled the trigger, that I was personally concerned and our investigation was concerned that this person was still on the loose somewhere and that I was concerned with the safety and security of his children and his family, and the officers involved in the investigation, the witnesses involved in the investigation, and ask[ed] that hopefully he would be willing to give us some information to assist in the investigation.

At that point appellant agreed to participate in a tape-recorded question-and-answer session. Officer Rysavy asked the questions and began by reviewing appellant's Miranda rights.

> Rysavy: * * * Do you understand all of those, Don?
>
> Howard: Yeah, why don't I have an attorney here now?
>
> Rysavy: Why don't you? Ah, would you rather have one present during our questioning?

Howard: Well, ah, no I guess not, * * *.

At trial appellant testified that he did not think he needed an attorney at the time he was questioned on August 24. During this interview appellant admitted hiring Webber to kill his wife. He also discussed his motiviation for procuring the killing. He described sending Webber $1,500 and a diamond ring wrapped in a magazine. This information led police to intercept the package and time their arrest of Webber accordingly. Howard also admitted giving Webber guns and other merchandise.

Appellant strenuously argues that all of the statements made during the August 24 interview must be suppressed because there was no valid waiver on his part of the right to counsel which he had invoked on the previous day.[1] Resolution of this question

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[1] Appellant also suggests that there was improper delay in presenting him to a

turns on interpretation of the United States Supreme Court's recent decision in Edwards v. Arizona, 451 U.S. 477 (1981), and the application of the Edwards holding to the facts of this case.

On sub-issue can be quickly resolved. Both parties expend considerable effort briefing the question of the retroactivity of Edwards. In a recent opinion, State v. Brown, 317 N.W.2d 714 (Minn. 1982), this court unequivocally declared that Edwards is not to be given only prospective application, because the case merely confirms Miranda v. Arizona, 384 U.S. 436 (1966).

Edwards told police on day one that he "want[ed] an attorney before making

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(footnote 1 continued) magistrate after his arrest. This contention has no merit. Minn. R. Crim. P. 4.02, subd. 5(1), requires presentation no later than 36 hours after arrest. Appellant was presented within 12 hours of his arrest. That delay was reasonable in view of the fact that the prosecutor had to draft and prepare two murder complaints.

a deal," and then was taken to jail. On the morning of day two detectives came to see Edwards and asked to talk to him. A detention officer informed Edwards that the detectives wished to talk to him, to which Edwards replied that he did not want to talk to anyone. "The guard told him that 'he had' to talk and then took him to meet with the detectives." Edwards at 479. Edwards then talked to police and implicated himself in the crime in question.

The Arizona Supreme Court found Edwards to have waived his right to remain silent and have counsel present during custodial interrogation. In reversing, the United States Supreme Court noted that "although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, * * *, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel." Id. at 484. The Court then described two

additional safeguards, with one delineated as follows:

> We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless accused himself initiates further communications, exchanges, or conversations with the police.

Id. at 484-85.

Respondent acknowledges that "clearly, then Edwards stated a new rule," that rule being that once the right to counsel has been invoked, a waiver of that right can only occur at the initiation of the holder of the right. In this case, Officer Siebert urged appellant to talk in the interests of protecting the safety and security of his children, family, the police officers, and witnesses. The meeting and conversation was not initiated by appellant and, therefore, was in violation of Edwards if the appellant had "expressed his desire to deal with the police only through counsel" the night before. Edwards at 484.

Respondent contends that appellant did not clearly assert his right to counsel nor did he express a desire to deal with police only through counsel. We agree. In response to Officer Rysavy's specific question on August 24, appellant stated that he "guessed" that he did not want an attorney present. He also confirmed during direct examination at trial that he didn't believe he needed an attorney present on the 24th. Appellant's request for counsel was not the clear, unequivocal kind of request required by Edwards, 451 U.S. at 485, and recently affirmed by our own case of Muhammed v. State, 316 N.W.2d 572 (Minn. 1982).

However, even assuming, arguendo, that it was error for police to question appellant on August 24 where appellant did not initiate the conversation, it must next be determined whether the error was prejudiced or merely harmless. We hold that if error was committed, that error was

harmless in the context of this case.

The standards for evaluating when a constitutional error may be found harmless have undergone considerable evolution since the mid-1960's. See W. LaFave, Search and Seizure, § 11.7(e)(1978). It is clear, nonetheless, that except in the rare case, see Chapman v. California, 386 U.S. 18, 23 and n.8 (1967), "the question of whether or not a constitutional error was harmless cannot be answered by considering the error in isolation." Harryman v. Estelle, 616 F.2d 870, 876 (5th Cir. 1980). "It is necessary to review the facts of the case and the evidence adduced at trial' to determine the effect of the unlawfully admitted evidence 'upon the other evidence adduced at trial and upon the conduct of the defense," id., quoting Fahy v. Connecticut, 375 U.S. 85, 87 (1963). We have endorsed this approach in Watts v. State, 305 N.W.2d 860, 862 (1981)(overruled in

part on other grounds by State v. Hatcher, 322 N.W.2d 210 (Minn. 1982).

In this case, before appellant's statement on August 24 the police had direct evidence of numerous prior attempts by appellant to hire others to kill his wife. Police also had telephone records showing numerous contacts between appellant and Webber. Further, the officers had records of appellant's store's selling several guns, including what was believed to have been the murder weapon, to Webber. Finally police had a taped conversation between Riniker and appellant where the clear import of appellant's statements was that he had hired someone to kill his wife. In the face of the overwhelming evidence, the discovery that a pay-off had been mailed was a minor addition to the state's case against appellant.

We recently left open the possibility that an improperly admitted confession might

be subject to the harmless error rule, see State v. Miller, 316 N.W.2d 23 (Minn. 1982). This is a proper case for the application of that rule.

3. On the morning of August 24, 1977, Joliet, Illinois, police officers Fred Hafner and William Fitzgerald spoke with Bruce Webber in Illinois. This conversation took place after appellant's arrest but before information of his confession reached the officers or Webber. During the conversation Webber gave a number of exculpatory explanations to the officers' questions. These explanations were later disproved at trial. Appellant's counsel objected to the officers' relating Webber's statements at trial, on the basis of hearsay. The trial court properly found the statements not hearsay under Minn.R.Evid. 801(d)(2)(E).

A statements is not hearsay if: "The statement is offered against a party and is * * * a statement made by a coconspirator of a party during the course and in

furtherance of the conspiracy." Id. Appellant contends that the state failed to show that Webber's statements were made in furtherance of a conspiracy.

The exculpatory statements made by Webber were designed to avoid detection of his relationship to appellant and the killing, with the goal, presumably, of insuring that the remaining payment he expected would still be collected. The answers were designed to promote the common good of the conspirators, which meets the broadly construed furtherance requirement. See United States v. Overshon, 494 F.2d 894 (8th Cir. 1974). See also State v. Kidd, 239 N.W.2d 860 (Iowa 1976).

The next question is whether the statements of Webber were made during the pendency of the conspiracy. The rule expressed in Krulewitch v. United States, 336 U.S. 440 (1949), is that courts will not find uncharged conspiracies aimed at

avoiding detection of a crime already committed in order to permit the use of hearsay statements made by co-conspirators. Id. at 444. Respondent argues that there is, however, a substantial body of case law which holds that when an integral act connected with the main objective of the conspiracy remains undone, the conspiracy remains alive.

In support of its position, respondent cites a California case, People v. Saling, 7 Cal.3d 844, 103 Cal.Rptr. 698, 500 P.2d 610 (1972). That case presented a murder-for-hire situation analogous to this case, with the state offering statements of a co-conspirator made three days after the murder. The California court admitted the statements, reasoning:

> It has long been the law in this state that a conspirator's statements are admissible against his co-conspirator only when made during the conspiracy and in furtherance thereof * * *. The conspiracy usually comes to an end when the substantive crime for which the co-conspirators are

> being tried is either attained or defeated * * *. It is for the trier of fact-considering the unique circumstances and the nature and purpose of the conspiracy of each case-to determine precisely when the conspiracy has ended * * *. Particular circumstances may well disclose a situation where the conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy. * * *
>
> Clearly the money offered by Murphy for killing his wife motivated defendant and Jerry Carnes to participate in the plan, and the transfer of the money was one of its main objectives as far as defendant and Carnes were concerned. Since payment to either defendant or Carnes had not yet occurred by the time of the conversation between Carnes and Jurgenson only three days after the murder, Jurgenson's statements to Carnes were admissible as being made during the conspiracy.

Id. at 615(emphasis added).

The Saling position is sensible and we apply it here. A separate concealment conspiracy is not created in contravention of the dictates of Krulewitch; instead, there is recognition that the conspiracy to murder for a free was as yet uncom-

pleted while part of that fee was traveling through the mails.

4. After appellant discovered his wife's body on the evening of August 13, 1977, he asked his next-door neighbor to call the police. Appellant admitted the police into his home when they arrived and accompanied them on their preliminary search of the basement. Later appellant was asked to leave, and police conducted a search of the entire house. The house was searched and, in a nightstand in the master bedroom, a patriarchal blessing and magazine articles dealing with marital problems were found. These items were sought to be suppressed as the products of a warrantless search that exceeded the proper scope of the search of a murder scene.

Appellant relies on Mincey v. Arizona, 437 U.S. 385 (1978) for support. Mincey rejected a "murder scene" exception created

by the Arizona Supreme Court to the requirement of showing exigent circumstances in order to justify the warrantless search of a home where a homicide has taken place. However, this case is distinguishable from Mincey in one critical respect. Appellant consented to this search. He called the police, invited them into his home, and, it may reasonbly be inferred from the testimony, expected and desired that the police search for weapons and other evidence.

Appellant, of course, focuses on the scope of his consent, arguing that the consent to search did not include the drawers in the upstairs bedroom. In response, the state takes the position that these articles would have been "inevitably discovered" and therefore excepted from the exclusionary rule. Two days after the body was discovered appellant gave the police a key and open invitation

to his home, and on August 24 he signed a consent-to-search form. The "inevitable discovery" rule, see LaFave, Search and Seizure, § 11.4 at 620-28 (1978); see also, Clough v. State, 555 P.2d 840, 841 (Nev. 1976), has received mixed reaction. LaFave, supra. Some commentators regard the rule as a "valuable, logical and constitutional principle," LaCount & Girese, The "Inevitable Discovery" Rule, an Evolving Exception to the Constitutional Exclusionary Rule, 40 Albany L. Rev. 483, 511 (1976), while others suggest that the rule "can only encourage police shortcuts whenever evidence may be more readily obtained by illegal than by legal means," Note, 74 Colum.L. Rev. 88, 99 (1974).

Ultimately, we are not persuaded to reverse on this ground because even if the admission of the evidence was error, that error is harmless. The fact that appellant or his wife had been reading literature on marital difficulties is a relatively

insignificant piece of evidence when viewed in the context of the totality of the evidence.

5. Finally, appellant contends that the taped phone conversation between himself and Raymond Riniker should not have been admitted. Appellant recognizes that the law in this state permits police to monitor conversations if one party to the conversation consents. Minn.Stat. § 626A.02, subs. 2(c) and (d)(1980), provides:

> (c) It shall not be unlawful under sections 626A.01 and 626A.23 for a person acting under color of law to intercept a wire or oral communication, where such person is a party to a communication or one of the parties to the communication has gien prior consent to such interception.
>
> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication when such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of

> the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

Appellant seeks to raise Raymond Riniker's reluctance to aid police in investigating his friend to such a level that he argues that Riniker's misgivings could only have been overcome by improper duress or coercion. The record does not support appellant's position. Our reading of the record leads us to conclude that Riniker's consent appears to have been freely and unequivocally given.

Therefore, for the reasons described above, we affirm the appellant's conviction.

Affirmed.

PETERSON, Justice (concurring specially).

The critical issue in this case is whether a new trial should be ordered on the ground that defendant's right to a fair trial was violated by the admission into evidence of his confession obtained during a custodial police interrogation without the presence of counsel for defendant.

I agree that defendant did not make a clear and unequivocal request for counsel during the initial interrogation on August 23, which preceded the challenged interrogation in the latter part of the morning on August 24. A reading of the typewritten transcript of the taped interrogation of August 23 seemingly indicates such request, but listening to the garbled tape itself discloses nuances of equivocal hesitation and tone of voice that persuade me otherwise.

The particular point of my separate statement of views is that, notwithstanding

the pointed language of Justice White in Edwards v. Arizona, 451 U.S. 477 (1981), forbidding police-initiated interrogation subsequent to a request for counsel, the facts of this case are so distinguishable from those in Edwards as not to foreclose a valid waiver even were it to be held that Howard had made an unequivocal request for counsel.

In Edwards, the defendant during his initial interview at night made an unequivocal request for counsel. On the following morning, at 9:30, the police came to the jail to interrogate him. He again clearly indicated that he did not wish to be interrogated, but the detention officer nonetheless took him to the police, stating that Edwards "had to" talk with the police.

In this case, defendant Howard is in a markedly different posture. Howard was neither unsophisticated nor indigent but was a business man presumably acquainted

and accustomed to dealing with lawyers. It appears that he had not used the available opportunity to retain counsel. It is clear from this portion of the trial transcripts that he did not wish counsel:

> Q Turing to August 24th, the day that Mr. Rysavy interviewed you, do you admit or do you deny if you were asked by Mr. Rysavy whether or not you wanted an attorney.
>
> A He asked me if I wanted an attorney.
>
> Q Do you admit or deny saying no to him.
>
> A I didn't think I needed one-no.

The transcript of both police interrogations makes abundantly clear the absence of any coercive atmosphere and, indeed, demonstrates commendable police restraint, bordering on solicitude, in dealing with defendant.

This assessment of the particular facts and circumstances of these interrogations is, except for the aspect of police initiation of the second interrogation, in

harmony with the Court's opinion in Edwards v. Arizona-at least with the understanding of it as articulated in the concurring opinion of Justice Powell, in which Justice Rehnquist joined. Justice White, in the majority opinion, wrote in part:

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' [Citations omitted.]

451 U.S. at 482-3.

> [H]owever sound the conculsion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. * * *
>
> [A]lthough we have held that after initially being advised of his Miranda rights, the accused may

> himself validly waive his rights and respond to interrogation [citation omitted], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-5.

Justice Powell concurred in the court's judgment but did not join in the opinion, "because [he was] not sure what it means" (id. at 488),[1] writing:

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[1] Chief Justice Burger, likewise concurring only in the judgment, based his concurrence on the fact that when Edwards told the officer that he did not wish to speak to the detectives he was told by the officer "that he had to." "This is

In view of the emphasis placed on 'initiation' [citation omitted], I find the Court's opinion unclear. If read to create a new per se rule, requiring a threshold inquiry as to precisely who opened any conversation between an accused and state officials, I cannot agree. * * *

Perhaps the Court's opinion can be read as not departing from established doctrine. Accepting the formulation quoted above, two questions are identifiable: (i) was there in fact 'interrogation' [citation omitted], and (ii) did the police 'initiate' it? Each of these questions is, of course, relevant to the admissibility of a confession. In this case, for example, it is clear that Edwards was taken from his cell against his will and subjected to renewed interrogation. Whether this is described as police-'initiated' interrogation or in some other way, it clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel.

But few cases will be as clear as this one. * * *

(footnote 1 continued) enough for me," Justice Burger said, "and on this record the Supreme Court of Arizona erred in holding that the resumption of interrogation was the product of a voluntary wiaver * * * ." 451 U.S. at 488.

Id. at 489-90.

> Who 'initiated' a conversation may be relevant to the question of waiver, but it is not the sine qua non to the inquiry. The ultimate of question is whether there was a free and knowing waiver of counsel before interrogation commenced.
>
> If the Court's opinion does nothing more than restate these principles, I am in agreement with it. I hesitate to join the opinion only because of what appears to be an undue, and undefined, emphasis on a single element: 'initiation.'

Id. at 491. The majority opinion did not directly respond to this alternative reading.

My final concern is with this court's alternative opinion that even if the confession obtained at the second, counselless interrogation was constitutionally impermissble, its reception into evidence was, beyond a reasonable doubt, without prejudice. The stated reason is that "[i]n the face of the overwhelming evidence [of defendant's guilt], the

discovery that a pay-off had been mailed [to accomplice Weber] was a minor addition to the state's case against appellant." This appears inconsistent with the court's opinion in State v. Caldwell, ___ N.W.2d ___ (Minn. 1982)(filed August 6, 1982), in which a new trial was granted the convicted defendant because of inadvertent expert opinion testimony incorrectly identifying a fingerprint as that of the defendant, notwithstanding acknowledgment that it may well be that, upon retrial, the other evidence will prove sufficient to convict him. In my view defendant Howard's confession dierectly linking his accomplice, Weber, with the murder and making possible the interception of the pay-off by police authorities, was no less critical than the evidence linking defendant Caldwell with the location of the crime. It may be said here, as it was there, that a jury, absent

such evidence, "might" have reached a different result. Slip op. at 23-30. The court's opinion reiterated that "to allow factually strong cases to erode such a basic [due process] right is to deny the existence of the right." Slip op. at 41. The grant of a new trial in Caldwell was based only upon this court's supervisory powers; in the present appeal we are concerned with a more serious issue of constitutional dimension.

AMDAHL, Chief Justice (concurring specially).

I concur in the majority opinion and write only because the special concurrence of Justice Peterson asserts that the majority opinion " * * * appears inconsistent with the court's opinion in State v. Caldwell * * *." It seems to me there can be no valid comparison, and thus no inconsistency between admittedly false testimony on a fact of such basic import as the defendant's fingerprints tying him to the locale of the crime, and evidence, as here, the truth of which is not questioned.

KELLEY, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,	)	
	)	
Respondent,	)	Supreme Court File
	)	No. 84620
vs.	)	
	)	
Donald Wayne Howard,	)	
	)	
Appellant.	)	
	)	

* * * * * * * * * * * *

PETITION FOR REHEARING

The Appellant, DONALD WAYNE HOWARD, by and through his attorneys, DOUGLAS W. THOMSON, and PAUL C. ENGH, hereby petitions the Minnesota Supreme Court, pursuant to Rule 140, Minnesota Rules of Civil Appellate Procedure, for a rehearing on the Court's decision in State of Minnesota v. Donald Wayne Howard, filed September 10, 1982. The grounds for the petition are these:

1. The Court did not consider the

issue raised by Appellant of whether Payton v. New York, 445 U.S. 573 (1980), as retroactively applied, would result in the suppression of his confession. This issue is brought to the Court's attention shortly after the United States Supreme Court found that Payton should be retroactively. United States v. Johnson, ___ U.S. ___, 31 Cr.L. 3100 (1982). The Johnson decision is contrary to this Court's ruling that Payton did not apply retroactively. State v. Smith, 305 N.W.2d 798 (Minn. 1981); State v. Watts, 305 N.W.2d 860, 861 (Minn. 1980), and State v. Gant, 305 N.W.2d 790, 791 (Minn. 1981); State v. Hinkle, 310 N.W.2d 97, 99 (Minn. 1981); State v. Glade, 306 N.W.2d 141, 143 (Minn. 1981).

2. This Court's conclusion that the introduction of Appellant's confession entered into evidence was harmless error

ignores the material fact that the buy-back money was obtained directly as a result of Appellant's confession and was crucial evidence leading to his conviction. Without it, Appellant's link with the actual murderer was not nearly so strong.

Respectfully submitted,

THOMSON, HAWKINS & ENGH

By _____
PAUL C. ENGH
Suite 1530
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-0856

Counsel for Appellant

Dated: September 17, 1982

STATE OF MINNESOTA

OFFICE OF CLERK OF SUPREME COURT

ST. PAUL, MINN.

October 4, 1982

State of Minnesota,
Respondent,

48620 and 81-735 vs.

Donald Wayne Howard,
Appellant.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for re-argument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

John McCarthy

Clerk Supreme Court

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

48620 vs.

Donald W. Howard,

Appellant.

O R D E R

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that appellant's motion to reinstate the above-entitled appeal be, and the same is, hereby granted and the appeal from judgment is hereby consolidated with the appeal from the order denying postconviction relief.

Dated: 9/2/81

BY THE COURT:

Chief Justice

D-1

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-906

IN THE

Supreme Court of the United States

October Term 1982

DONALD WAYNE HOWARD,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS L. FABEL
Deputy Attorney General
State of Minnesota
Counsel of Record

WARREN SPANNAUS
Attorney General
State of Minnesota
NORMAN B. COLEMAN, JR.
JANET NEWBERG ANDERSON
Special Assistant
Attorneys General
Second Floor, Ford Building
117 University Avenue
St. Paul, Minnesota 55155
(612) 296-7579
Attorneys for Respondent

224-7631 — Review Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court properly applied the rule in *Edwards v. Arizona* where petitioner did not clearly assert his right to counsel and did not express a desire to deal with police only through counsel.

2. Whether the Minnesota Supreme Court properly refused to apply *Payton v. New York* retroactively to petitioner's arrest where petitioner failed to raise the *Payton* issue on direct appeal.

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IN THE

Supreme Court of the United States

October Term 1982

No. 82-906

DONALD WAYNE HOWARD,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari to review the decision of the Supreme Court of the State of Minnesota filed on August 31, 1982.

STATEMENT OF THE CASE

On January 31, 1978, following a jury trial, petitioner Donald Wayne Howard was convicted of murder in the first degree, in violation of Minn. Stat. § 609.185(1), and conspiracy to commit murder, in violation of Minn. Stat. § 609.175, subd. 2(2) for the murder-for-hire killing of his wife, Shirleen Howard. Petitioner applied to the trial court for post-conviction relief, pursuant to Minn. Stat. § 590.01, subd. 3.[1] Petitioner claimed entitlement to post-conviction relief based upon this Court's then recent holding in *Payton v. New York*, 445 U.S. 370 (1980), and upon petitioner's convictions for two offenses arising out of the same course of conduct. Memorandum of Law in Support of Petition for Post-Conviction Relief, at 3-9. The trial court granted petitioner's request to vacate his conviction for conspiracy to commit murder as a lesser-included crime, and declined to apply *Payton* retroactively to petitioner's arrest. Trial Court's Findings of Fact, Conclusions of Law and Order, May 27, 1981, at 4. The trial court noted that since Minnesota law clearly dictated that *Payton* not be applied retroactively, it need not consider whether there were exigent circumstances surrounding petitioner's arrest. Trial Court's Findings of Fact, Conclusions of Law and Order, May 27, 1981, at 5.

Petitioner successfully reinstituted a previously dismissed appeal on the merits to the Minnesota Supreme Court on

[1] Minn. Stat. § 590.01, subd. 3 provides, "A person who has been convicted and sentenced for a crime committed before May 1, 1980, may institute a proceeding applying for relief under this chapter upon the ground that a significant change in substantive or procedural law has occurred which, in the interests of justice, should be applied retroactively, including resentencing under subsequently enacted law."

September 2, 1981.[2] The Minnesota Supreme Court heard the appeal, and affirmed petitioner's conviction on August 31, 1982. *See* Appendix A. Petitioner did not include the *Payton* retroactivity issue in that appeal.

United States v. Johnson, —— U.S. ——, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), was decided by this Court on June 21, 1982, while petitioner's case was pending before the Minnesota Court. *Johnson* made *Payton v. New York, supra*, retroactive to cases pending on direct appeal when this Court decided *Payton*. Hence, *Johnson* could conceivably have had some bearing upon petitioner's appeal *if* petitioner had properly presented the issue to the Supreme Court in a timely manner. However, in spite of the *Johnson* ruling, petitioner still failed to present the *Payton* retroactivity question on appeal, either through a supplemental brief or through oral argument.

Petitioner filed a Petition For Rehearing on September 20, 1982, about three weeks after his conviction was affirmed. Petitioner requested that the Minnesota Supreme Court rehear arguments presented on direct appeal, and also hear arguments concerning the applicability of *Payton* to petitioner's arrest. Petitioner's request for rehearing was denied on October 4, 1982.

Respondent accepts petitioner's statement of the facts of the case. Petitioner, however, did not set forth the full transcript of relevant portions of petitioner's statements to police on August 23, 1977, and August 24, 1977. Full transcripts of

[2] Petitioner had filed a Notice of Appeal to the Minnesota Supreme Court on February 21, 1978. The appeal was dismissed on August 18, 1980 for petitioners' failure to meet filing deadlines. Petitioner moved to reinstate his appeal, and permission was granted by the Minnesota Supreme Court on September 2, 1981.

these portions, set forth below, are necessary before *Edwards* can be properly applied. *Edwards v. Arizona*, 451 U.S. 477 (1981).

Petitioner was arrested at home on August 23, 1977, and transported to the police station in Winona, Minnesota. (T. 2459-2460).[3] Petitioner was advised of his *Miranda* rights and interrogated. *Id.* Towards the end of the session, the following exchange took place between petitioner Donald Howard ("D.H.") and Special Agent Robert Rysavy of the Minnesota Bureau of Criminal Apprehension ("R.W.R."):

DH: I can't because I don't know actually who done it.

RWR: Tell me what transpired. Do you realize if you tell me the whole story you are going to involve yourself all the more, but I have told you the evidence we have accumulated, and I think you will agree, we have done fairly good.

DH: Well, I don't think I'd better say anymore until I have an attorney.

RWR: Do you want to end our conversation now?

DH: I'll talk as long as you want to, but . . .

RWR: Well, you just said you didn't want to say anymore until you had an attorney.

DH: Well I guest I won't make any conversation.

RWR: Do you recall when we first started, when I advised you of your rights, the last thing I said to you that if we did start talking and any time during our conversations you wanted to stop, you say so? Is this that time?

DH: I guess so, yeah.

---

[3] "T." refers to trial transcript.

RWR: You think it is. You want to think on it. All right, Don, not just so that I have the last word or anything do you feel that I lied to you at any time during our conversation?

DH: I think you are guessing.

(State's Omnibus Exhibit 15 at 15-16.)

Later that night after questioning ended, two police officers took a copy of petitioner's statement to him in jail. (O. 126).[4] Petitioner asked the officers, "I must really be sick, huh?" (T. 1996, O. 129).

The next morning, August 24, 1977, two officers met with petitioner. (O. 50, 104). The officers reminded petitioner of his constitutional rights, including his right to counsel. (O. 51-52, 104). Petitioner acknowledged his rights and did not ask for an attorney. (O. 52, 104). The officers asked petitioner if he wanted to talk to them, and petitioner paused and replied, "I will help you get the other guy." (O. 52, 105).

Officers took a tape recorded statement of petitioner, and the statement was played at trial. (T. 2477-2501). The following exchange occurred between Agent Rysavy and petitioner early in petitioner's statement:

RWR: Do you understand all of those, Don?

DH: Yeah, why don't I have an attorney here now?

RWR: Why don't you? Ah, would you rather have one present during our questioning?

DH: Well, ah, no I guess not, I, ah . . . Guess.

(T. 2478-2479).

[4] "O" refers to Omnibus transcript.

ARGUMENT SUPPORTING REASONS FOR DENYING CERTIORARI

Respondent and petitioner agree that this Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981) controls a determination of whether or not statements made to police by petitioner were constitutionally obtained. Respondent and petitioner only disagree as to the meaning of certain statements and silences of petitioner, and whether these statements and silences constitute a clear and unequivocal request for counsel per *Edwards*. *Edwards, supra*, at 485.

The Minnesota Supreme Court factually analyzed the statements made by petitioner, and agreed with the trial court's finding that petitioner did not clearly assert his right to counsel nor did he express a desire to deal with police only through counsel. *State v. Howard*, No. 81-735, Slip. Op. at A-11 (Minn. 1982). Justice Peterson noted in his special concurrence:

> "I agree that defendant did not make a clear and unequivocal request for counsel during the initial interrogation on August 23, which preceded the challenged interrogation in the latter part of the morning on August 24. A reading of the typewritten transcript of the taped interrogation of August 23 seemingly indicates such a request, but listening to the garbled tape itself discloses nuances of equivocal hesitation and tone of voice that persuade me otherwise."

Id. at A-18.

This Court has held, "We do not grant a certiorari to review evidence and discuss facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This Court has noted that

even where a question of fact may have constitutional significance, the Court normally accords findings of state courts deference in reviewing constitutional claims, and that it will accept the factual findings of state courts in the absence of exceptional circumstances. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *California Retail Liquor Dealers Association v. Medcal Aluminum*, 445 U.S. 97 (1980). No such exceptional circumstances are present in the instant case.

Here, resolution of the nature and consequence of petitioner's statements required a purely factual determination. The Minnesota Supreme Court performed that factual analysis and found that petitioner's statements were obtained in accordance with *Edwards*. *State v. Howard*, No. 81-735, Slip. Op. at A-11 (Minn. 1982). Consideration by this Court of the factual questions raised by petitioner in his petition will not serve to clarify *Edwards* or assist similarly situated criminal defendants, since factual analysis by its very nature is unique and limited in applicability to the individual case under consideration. This Court should therefore accord deference to the factual findings of the Minnesota Supreme Court and deny this petition.

After concluding that there was no violation of *Edwards* in this case, the Minnesota Supreme Court further concluded that even if petitioner's statements were unconstitutionally obtained, their admission into evidence constituted harmless error. *State v. Howard*, No. 81-735, Slip. Op. at A-12 (Minn. 1982). The evidence presented against petitioner at trial was overwhelming. *Howard, supra*, at A-13. There is no question but that petitioner's conviction for first degree murder was morally correct and just. There is also no question but that law enforcement officers scrupulously attempted to insure that petitioner was afforded each and every one of his con-

stitutional rights. Agent Rysavy made every effort on August 23 and August 24 to carefully explain petitioner's rights to him. (State's Omnibus Exhibit 15 at 15-16) (T. 2478-2479). During questioning by Rysavy on August 24, petitioner at one point asked if he should have an attorney present while the statement was being tape recorded. (O. 147). Agent Rysavy carefully explained the availability of court appointed counsel, and asked petitioner whether he wanted an attorney. (O. 95, 147). Petitioner considered the question for about ten seconds and replied, "No, I guess we'll go ahead and I will tell you this on tape." (O. 95, 147). Thus, the overwhelming weight of the evidence in this case and the good faith efforts by law enforcement officers to observe procedural rights provide additional reasons to deny this petition for certiorari.

Petitioner also argues that this Court should grant his petition for a writ of certiorari to determine whether *Payton v. New York, supra,* should be applied retroactively to petitioner's arrest and post-arrest statements.

On July 23, 1982, the Minnesota Supreme Court quickly overruled its line of cases inconsistent with this court's holding in *United States v. Johnson,* —— U.S. ——, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), making *Payton v. New York, supra,* retroactively applicable. *Johnson* is now carefully applied to relevant cases in Minnesota. *See, State v. Hatcher,* 322 N.W.2d 210 (Minn. 1982).

Petitioner, however, waived consideration of the *Payton* issue before the Minnesota Supreme Court. Although the issue was considered by the trial court, petitioner did not include it in his brief to the Minnesota Supreme Court. Even though this Court's decision in *U.S. v. Johnson* was issued after the submission of that brief, petitioner still failed to properly

present the issue either through a supplemental brief or through oral argument. Not until after the Supreme Court issued its opinion did petitioner seek a ruling on the *Payton* issue, and then only through a petition for rehearing. Under Minnesota law, however, such petitions must be restricted to the matters which the Supreme Court has "overlooked, failed to consider, misapplied or misconceived." Minn. Rules Civ. App. Pro. 140.[5] The rule clearly does not contemplate consideration of an entirely new issue, which is precisely what petitioner sought to obtain.

In light of the above, this Court should deny petitioner's request for a writ of certiorari. Petitioner failed to properly present the *Payton* issue to the Minnesota Supreme Court and failed to abide by that cardinal principle of appellate practice, that issues will not be reviewed on appeal where they have not been presented. Denial of this petition will not leave peti-

---

[5] Minn. Rule Civ. App. Pro. 140 provides:

A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity any controlling statute, decision, or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived. The petition shall be served upon the opposing party who may answer within 5 days thereafter. Oral argument in support of the petition will not be permitted. Thirteen copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk, except that any duplicated copy, other than a carbon copy, of a typewritten original may also be filed. A filing fee of $25 shall accompany the petition for rehearing. The filing of a petition for rehearing stays the entry of judgment until disposition of such petition. It does not stay the taxation of costs. If the petition is denied, the party responding to the petition may be awarded attorneys fees to be allowed by the court in the amount not to exceed $500.

tioner without a remedy. Petitioner can return to the trial court for additional post-conviction relief pursuant to Minn. Stat. § 590.01, subd. 3, or can apply for federal habeas corpus relief.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

THOMAS L. FABEL
Deputy Attorney General
State of Minnesota
Counsel of Record

WARREN SPANNAUS
Attorney General
State of Minnesota
NORMAN B. COLEMAN, JR.
JANET NEWBERG ANDERSON
Special Assistant
Attorneys General
Second Floor, Ford Building
117 University Avenue
Saint Paul, Minnesota 55155
(612) 296-7579
Attorneys for Respondent

APPENDIX A

Winona County

Scott, J.
Concurring Specially,
Peterson, J., Amdahl, C.J.
Took no part,
Kelley, J.

Endorsed
Filed August 31, 1982
John McCarthy, Clerk
Minnesota Supreme Court

STATE OF MINNESOTA,

Respondent,

vs. 48620, 81-735

DONALD WAYNE HOWARD,

Appellant.

SYLLABUS

1. Appellant was not denied his due-process right to a fair and impartial jury where there was no showing that the jury was predisposed to convict appellant.

2. Appellant did not clearly express his desire to deal with police only through counsel, and even assuming he did and his confession was therefore improperly admitted, the admission was harmless error.

3. Appellant's conspiracy to commit murder was not yet complete while the fee was unpaid; consequently, the statements made by appellant's co-conspirator were not hearsay.

4. The admission of items seized during the search of appellant's home was harmless error, if error at all.

5. The consent given by Raymond Riniker to have his conversation with appellant taped was freely given, and the conversation was properly admitted.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

SCOTT, Justice.

This is an appeal of the partial denial of post-conviction relief in the case of the conviction of appellant for murder in the first degree. The trial judge denied in part the petition for post-conviction relief. The conspiracy-to-commit-murder conviction was vacated as a lesser-included offense. *See* Minn. Stat. § 609.04 (1980).

This is the second time we have been asked to review the conviction of a defendant charged in the killing of Shirleen Howard. The first occasion is set out in *State v. Webber*, 292 N.W.2d 5 (Minn. 1980), wherein we upheld the conviction of Bruce Webber. In this case we affirm the conviction of the man accused of hiring Bruce Webber to kill Shirleen Howard.

Shirleen Howard's body was discovered by her husband, the appellant Donald Howard (hereafter Howard), on Saturday, August 13, 1977, at approximately 9:15-9:20 p.m. in the basement of the Howard home. Mrs. Howard was found with two gunshot wounds in her head, and she had just been shot. Nothing in the home was disturbed or missing. Bruce Webber was convicted of committing the murder, and Howard was convicted of first degree murder for hiring Webber to do the killing.

After discovering his wife's body, Howard took his children to the next-door neighbor's home, and the police were called. The police arrived at 9:23 and began searching for clues. A .45 caliber bullet and a .45 caliber casing were found near

the body. The rest of the home was searched, and some articles and pamphlets on the subject of marital difficulties were found in the master bedroom. Two days later the police returned to the scene and appellant assisted the officers in their investigation.

The prosecution's firearms identification expert concluded that the bullets found at the crime scene were in all likelihood fired from a Llama firearm. Gun records from Howard's Coast to Coast store indicated that five guns, including a .45 Llama, were transferred to Webber.

The day after the killing a friend of Howard, Charles Murphy, called police, and on Monday, spoke to them. Murphy testified at trial that he described to police how in August 1976 Howard had offered him a total of $4,000 to kill Shirleen Howard. Murphy refused, but over a period of months Howard sent Murphy messages that could be interpreted as renewals of his original request to Murphy.

Police learned of another individual whom Howard contacted for the purpose of killing his wife. Police contacted Raymond Riniker, a former classmate of Howard, and met with him on August 18, 1977. Riniker also related conversations with Howard where he was offered money to kill Howard's wife. Howard gave Riniker $1,000 and offered to supply a gun. In March of 1977 Riniker called Howard to tell him he had changed his mind.

Riniker further testified that he stopped by Howard's store in the summer of 1977 and observed Howard meeting with a third party. After the third person left, Riniker asked Howard if that was the individual who was supposed to kill his wife. Howard said he had paid the man, a resident of Joliet, Illinois (Webber's residence), $2,000, and had given him an archery bow and a gun. In the course of their investi-

gation the police established through telephone records that numerous phone calls were placed from Howard's store and home to Webber's home prior to Howard's arrest. As late as August 7, Howard offered Riniker a motorhome as payment for the killing.

On August 23, 1977, arrangements were made to monitor a telephone conversation between Riniker and Howard. A meeting was arranged for later that day, and Riniker consented to allow police to bug the conversation. Police then stationed themselves outside the Howard home where they listened to the conversation. Howard told Riniker:

> Butch don't worry * * *. Listen, let me tell you what happened. This guy—I told you he had backed off. He didn't seem to want to do it. He called me up and he said, "Do you still want to do that?" and I said, "Yeah." I said O.K. I come home and that's what I found. He was planning an accident, it was supposed to be an accident. I was so God damn mad—and it was gruesome.

After Riniker left, police arrested Howard. Police advised Howard of his rights, but he did talk with officers, essentially denying any complicity in the killing. The following day, August 24, police questioned Howard again, and during that conversation he confessed. He admitted paying Webber $2,000 and merchandise. He also disclosed that on the preceding morning he had mailed Webber a certified package containing $1,500 and a diamond ring.

Webber was arrested on August 26 in Joliet, Illinois, just after he received the package containing the money and ring sent by Howard. Subsequent investigation revealed several personal contacts between Webber and Howard, including a meeting on August 12, 1977, the day before the murder.

Near the end of October, 1977, Howard escaped from the Winona County Jail. He was apprehended with Nancy Brown in Louisiana on October 31, 1977.

Howard took the stand and denied hiring Webber. His defense was that his conversations with Murphy and Riniker concerning killing Shirleen Howard were conducted in jest. The same reasoning applied, Howard testified, to his conversations with Jerry Sorenson where the topic of killing his wife arose. He testified that the ring and money were sent to Webber because Webber had threatened him. He explained his admissions to police as fabrications motivated by a desire to keep Webber off the streets and away from his family.

This appeal presents the following issues for resolution:

(1) Whether appellant was denied his due-process right to a fair and impartial jury; (2) whether the use of appellant's statements against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation; (3) whether the statements made by appellant's codefendant after the murder were properly admitted; (4) whether the evidence seized during a search of appellant's home on the night of the murder violated appellant's Fourth Amendment rights; and (5) whether the taped conversation between appellant and Raymond Riniker was properly admitted.

1. Appellant requests a new trial because some members of his jury were aware that his codefendant, Bruce Webber, had already been convicted of the murder of Shirleen Howard. Appellant contends that this knowledge prevented the jurors from presuming appellant's innocence because the conviction of the codefendant inescapably invited the jury to believe that Webber's guilt implied appellant's guilt. Respondent urges this court to deny appellant's request, and argues that there

was no showing of partiality by the jury or, alternatively, that appellant waived his right to object to the seating of jurors who had been exposed to pretrial publicity.

The voir dire process consumed six and one-half trial days, during which time fifty-one jurors were examined. Each of the jurors and alternates who indicated that they had knowledge of Webber's conviction testified that their knowledge would not influence their decision in appellant's case. Respondent points out that appellant passed most of the jurors who possessed what he now regards as patently prejudicial information without challenging for cause or exercising a preemptory challenge. In the case, for example, of the fourth prospective juror, the fact of the prior conviction was revealed by appellant's attorney and the juror was accepted by appellant.

In *State v. Krampotich*, 282 Minn. 182, 163 N.W.2d 772 (1968), this court found a waiver of the right to challenge a jury panel where that panel was aware of a related prior conviction. However, *Krampotich* is not quite as close an analogy as respondent suggests. Appellant in this case made several motions prior to the final impanelment of the jury to have all those with knowledge of the Webber conviction struck for cause. Counsel in *Krampotich* deliberately sought to seat the jurors who had found favorably in an earlier trial on his case; therefore, the waiver was much clearer.

Assuming, arguendo, that there was no waiver, appellant still falls short of establishing that the jury was predisposed to convict. In *State v. Beier*, 263 N.W.2d 622 (Minn. 1978), this court said:

> In order to successfully challenge a juror for cause under Rule 26.02, subd. 5, in a case involving pretrial publicity, the defendant must do more than elicit an admission from the potential juror that he has been exposed to pretrial

> publicity. The test is whether the potential juror exposed to such publicity demonstrates to the satisfaction of the court that he can set aside preconceptions and render an impartial verdict.

Id. at 626. *Cf. State v. Webber*, 292 N.W.2d 5, 12 (Minn. 1980) (pretrial publicity as it affects venue). In this case the jurors were repeatedly tested and admonished concerning their impartiality. It was noted in *Beier*, 263 N.W.2d at 627, that "[s]ince the trial court heard the testimony of the three jurors and observed their demeanor, he was in a better position than we are to decide whether they were telling the truth when they testified that their knowledge of the other charges had not affected their thinking."

Appellant's citation to *Irvin v. Dowd*, 366 U.S. 717 (1961), is not helpful to his argument because the egregious facts of *Irvin* (eight of the twelve jurors believed the accused was guilty) stand in sharp contrast to this case. If, as here, the jurors indicate their intention to set aside any preconceived notions, and demonstrate to the satisfaction of the trial judge that they are able to do so, this court will not lightly substitute its own judgment. *See United States v. Radetsky*, 535 F.2d 556 (10th Cir. 1976), *cert. denied* 429 U.S. 820 (1976).

2. The issue concerning whether the use of appellant's statements against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation is the most difficult issue presented by the appeal. On August 23, 1977, when appellant was arrested, Officer Rysavy questioned him concerning the homicide. Appellant was evasive, and made no admissions concerning any involvement on his part in the killing of his wife. Near the end of the August 23 conversation the police revealed that they had recorded appellant's conversation with Ray-

mond Riniker just prior to his arrest. In that conversation appellant had implicated himself in the homicide.

Following the revelation of the recorded conversation appellant refused to talk further. The relevant portion of the transcript is set out below:

DH: I can't tell you any more.

RWR: You can't or you won't?

DH: I can't—'cause I don't know actually who done it.

RWR: Tell me what transpired. You realize if you tell me the whole store [sic] you're going to involve yourself all the more. I told you the evidence that we've accumulated and I think you'll agree that we've done fairly good.

DH: I don't think I better say anymore—till I have an attorney.

RWR: Do you want to end our conversation now?

DH: I'll talk as long as you want to, but * * *

RWR: Well, you just said you didn't want to say anymore till you had an attorney.

DH: Well I guess I won't make any conversation.

RWR: Do you recall when we first started and I advised you of your rights, the last thing I said to you—we could stop talking at anytime during our conversation if you'd just say so. Is this that time?

DH: I guess so, yeah.

RWR: You think it is. You want to think on it. All right, Don, not just so that I have the last word or anything—do you feel that I've lied to you at anytime during our conversation?

DH: I think you're guessing.

After some further comments by the officer concerning the strength of their evidence, the interrogation of appellant ceased.

The next day, August 24, two officers went to appellant's cell. One of the officers testified at the omnibus hearing that:

> I explained that I was very interested in getting more information in regard to the person that actually pulled the trigger, that I was personally concerned and our investigation was concerned that this person was still on the loose somewhere and that I was concerned with the safety and security of his children and his family, and the officers involved in the investigation, the witnesses involved in the investigation, and ask[ed] that hopefully he would be willing to give us some information to assist in the investigation.

At that point appellant agreed to participate in a tape-recorded question-and-answer session. Officer Rysavy asked the questions and began by reviewing appellant's Miranda rights.

> Rysavy: * * * Do you understand all of those, Don?
>
> Howard: Yeah, why don't I have an attorney now?
>
> Rysavy: Why don't you? Ah, would you rather have one present during our questioning?
>
> Howard: Well, ah, no I guess not, * * *.

At trial appellant testified that he did not think he needed an attorney at the time he was questioned on August 24. During this interview appellant admitted hiring Webber to kill his wife. He also discussed his motivation for procuring the killing. He described sending Webber $1,500 and a diamond ring wrapped in a magazine. This information led police to intercept the package and time their arrest of Webber accordingly. Howard also admitted giving Webber guns and other merchandise.

Appellant strenuously argues that all of the statements made during the August 24 interview must be suppressed because there was no valid waiver on his part of the right to counsel which he had invoked on the previous day.[1] Resolution of this question turns on interpretation of the United States Supreme Court's recent decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), and the application of the *Edwards* holding to the facts of this case.

One sub-issue can be quickly resolved. Both parties expend considerable effort briefing the question of the retroactivity of *Edwards*. In a recent opinion, *State v. Brown*, 317 N.W.2d 714 (Minn. 1982), this court unequivocally declared that *Edwards* is not to be given only prospective application, because the case merely confirms *Miranda v. Arizona*, 384 U.S. 436 (1966).

Edwards told police on day one that he "want[ed] an attorney before making a deal," and then was taken to jail. On the morning of day two detectives came to see Edwards and asked to talk to him. A detention officer informed Edwards that the detectives wished to talk to him, to which Edwards replied that he did not want to talk to anyone. "The guard told him that 'he had' to talk and then took him to meet with the detectives." *Edwards* at 479. Edwards then talked to police and implicated himself in the crime in question.

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[1] Appellant also suggests that there was improper delay in presenting him to a magistrate after his arrest. This contention has no merit. Minn. R. Crim. P. 4.02, subd. 5(1), requires presentation no later than 36 hours after arrest. Appellant was presented within 12 hours of his arrest. That delay was reasonable in view of the fact that the prosecutor had to draft and prepare two murder complaints.

The Arizona Supreme Court found Edwards to have waived his right to remain silent and have counsel present during custodial interrogation. In reversing, the United States Supreme Court noted that "although we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, * * *, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel." *Id.* at 484. The Court then described two additional safeguards, with one delineated as follows:

> We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85.

Respondent acknowledges that "clearly, then *Edwards* stated a new rule," that rule being that once the right to counsel has been invoked, a waiver of that right can only occur at the initiation of the holder of the right. In this case, Officer Siebert urged appellant to talk in the interests of protecting the safety and security of his children, family, the police officers, and witnesses. The meeting and conversation was not initiated by appellant and, therefore, was in violation of *Edwards* if the appellant had "expressed his desire to deal with the police only through counsel" the night before. *Edwards* at 484.

Respondent contends that appellant did not clearly assert his right to counsel nor did he express a desire to deal with police only through counsel. We agree. In response to Officer Rysavy's specific question on August 24, appellant stated

that he "guessed" that he did not want an attorney present. He also confirmed during direct examination at trial that he didn't believe he needed an attorney present on the 24th. Appellant's request for counsel was not the clear, unequivocal kind of request required by *Edwards*, 451 U.S. at 485, and recently affirmed by our own case of *Muhammed v. State*, 316 N.W.2d 572 (Minn. 1982).

However, even assuming, *arguendo*, that it was error for police to question appellant on August 24 where appellant did not initiate the conversation, it must next be determined whether the error was prejudicial or merely harmless. We hold that if error was committed, that error was harmless in the context of this case.

The standards for evaluating when a constitutional error may be found harmless have undergone considerable evolution since the mid-1960's. *See* W. LaFave, *Search and Seizure*, § 11.7(e) (1978). It is clear, nonetheless, that except in the rare case, *see Chapman v. California*, 386 U.S. 18, 23 and n.8 (1967), "the question of whether or not a constitutional error was harmless cannot be answered by considering the error in isolation." *Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir. 1980). " 'It is necessary to review the facts of the case and the evidence adduced at trial' to determine the effect of the unlawfully admitted evidence 'upon the other evidence adduced at trial and upon the conduct of the defense,' " *id.*, quoting *Fahy v. Connecticut*, 375 U.S. 85, 87 (1963). We have endorsed this approach in *Watts v. State*, 305 N.W.2d 860, 862 (1981) (*overruled in part on other grounds* by *State v. Hatcher*, 322 N.W.2d 210 (Minn. 1982).

In this case, before appellant's statement on August 24 the police had direct evidence of numerous prior attempts by

appellant to hire others to kill his wife. Police also had telephone records showing numerous contacts between appellant and Webber. Further, the officers had records of appellant's store's selling several guns, including what was believed to have been the murder weapon, to Webber. Finally, police had a taped conversation between Riniker and appellant where the clear import of appellant's statements was that he had hired someone to kill his wife. In the face of the overwhelming evidence, the discovery that a pay-off had ben mailed was a minor addition to the state's case against appellant.

We recently left open the possibility that an improperly admitted confession might be subject to the harmless error rule, *see State v. Miller*, 316 N.W.2d 23 (Minn. 1982). This is a proper case for the application of that rule.

3. On the morning of August 24, 1977, Joliet, Illinois, police officers Fred Hafner and William Fitzgerald spoke with Bruce Webber in Illinois. This conversation took place after appellant's arrest but before information of his confession reached the officers or Webber. During the conversation Webber gave a number of exculpatory explanations to the officers' questions. These explanations were later disproved at trial. Appellant's counsel objected to the officers' relating Webber's statements at trial, on the basis of hearsay. The trial court properly found the statements not hearsay under Minn. R. Evid. 801(d)(2)(E).

A statement is not hearsay if: "The statement is offered against a party and is * * * a statement made by a coconspirator of a party during the course and in furtherance of the conspiracy." *Id.* Appellant contends that the state failed to show that Webber's statements were made in furtherance of a conspiracy.

The exculpatory statements made by Webber were designed to avoid detection of his relationship to appellant and the killing, with the goal, presumably, of insuring that the remaining payment he expected would still be collected. The answers were designed to promote the common good of the conspirators, which meets the broadly construed furtherance requirement. *See United States v. Overshon*, 494 F.2d 894 (8th Cir. 1974). *See also State v. Kidd*, 239 N.W.2d 860 (Iowa 1976).

The next question is whether the statements of Webber were made during the pendency of the conspiracy. The rule expressed in *Krulewitch v. United States*, 336 U.S. 440 (1949), is that courts will not find uncharged conspiracies aimed at avoiding detection of a crime already committed in order to permit the use of hearsay statements made by co-conspirators. *Id.* at 444. Respondent argues that there is, however, a substantial body of case law which holds that when an integral act connected with the main objective of the conspiracy remains undone, the conspiracy remains alive.

In support of its position, respondent cites a California case, *People v. Saling*, 7 Cal.3d 844, 103 Cal. Rptr. 698, 500 P.2d 610 (1972). That case presented a murder-for-hire situation analogous to this case, with the state offering statements of a co-conspirator made three days after the murder. The California court admitted the statements, reasoning:

> It has long been the law in this state that a conspirator's statements are admissible against his co-conspirator only when made during the conspiracy and in furtherance thereof * * *. The conspiracy usually comes to an end when the substantive crime for which the co-conspirators are being tried is either attained or defeated * * *. It is for the trier of facts—considering the unique cir-

> cumstances and the nature and purpose of the conspiracy of each case—to determine precisely when the conspiracy has ended * * *. *Particular circumstances may well disclose a situation where the conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy.* * * *
>
> Clearly the money offered by Murphy for killing his wife motivated defendant and Jerry Carnes to participate in the plan, and the transfer of the money was one of its main objectives as far as defendant and Carnes were concerned. Since payment to either defendant or Carnes had not yet occurred by the time of the conversation between Carnes and Jurgenson only three days after the murder, Jurgenson's statements to Carnes were admissible as being made during the conspiracy.

Id. at 615 (emphasis added).

The *Saling* position is sensible and we apply it here. A separate concealment conspiracy is not created in contravention of the dictates of *Krulewitch*; instead, there is a recognition that the conspiracy to murder for a fee was as yet uncompleted while part of that fee was traveling through the mails.

4. After appellant discovered his wife's body on the evening of August 13, 1977, he asked his next-door neighbor to call the police. Appellant admitted the police into his home when they arrived and accompanied them on their preliminary search of his basement. Later appellant was asked to leave, and police conducted a search of the entire house. The house was searched and, in a nightstand in the master bedroom, a patriarchal blessing and magazine articles dealing with marital problems were found. These items were sought to be suppressed as the products of a warrantless search that exceeded the proper scope of the search of a murder scene.

Appellant relies on *Mincey v. Arizona*, 437 U.S. 385 (1978) for support. *Mincey* rejected a "murder scene" exception created by the Arizona Supreme Court to the requirement of showing exigent circumstances in order to justify the warrantless search of a home where a homicide has taken place. However, this case is distinguishable from *Mincey* in one critical respect. Appellant consented to this search. He called the police, invited them into his home, and, it may reasonably be inferred from the testimony, expected and desired that the police search for weapons and other evidence.

Appellant, of course, focuses on the scope of his consent, arguing that the consent to search did not include the drawers in the upstairs bedroom. In response, the state takes the position that these articles would have been "inevitably discovered" and therefore excepted from the exclusionary rule. Two days after the body was discovered appellant gave the police a key and open invitation to his home, and on August 24 he signed a consent-to-search form. The "inevitable discovery" rule, *see* LaFave, *Search and Seizure*, § 11.4 at 620-28 (1978); *see also Clough v. State*, 555 P. 2d 840, 841 (Nev. 1976), has received mixed reaction. LaFave, *supra*. Some commentators regard the rule as a "valuable, logical and constitutional principle," LaCount & Girese, *The "Inevitable Discovery" Rule, an Evolving Exception to the Constitutional Exclusionary Rule*, 40 Albany L. Rev. 483, 511 (1976), while others suggest that the rule "can only encourage police shortcuts whenever evidence may be more readily obtained by illegal than by legal means," Note, 74 Colum. L. Rev. 88, 99 (1974).

Ultimately, we are not persuaded to reverse on this ground because even if the admission of the evidence was error, that error is harmless. The fact that appellant or his wife had been

reading literature on marital difficulties is a relatively insignificant piece of evidence when viewed in the context of the totality of the evidence.

5. Finally, appellant contends that the taped phone conversation between himself and Raymond Riniker should not have been admitted. Appellant recognizes that the law in this state permits police to monitor conversations if one party to the conversation consents. Minn. Stat. § 626A.02, subds. 2(c) and (d) (1980), provides:

> (c) It shall not be unlawful under sections 626A.01 to 626A.23 for a person acting under color of law to intercept a wire or oral communication, where such person is a party to a communication or one of the parties to the communication has given prior consent to such interception.
>
> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

Appellant seeks to raise Raymond Riniker's reluctance to aid police in investigating his friend to such a level that he argues that Riniker's misgivings could only have been overcome by improper duress or coercion. The record does not support appellant's position. Our reading of the record leads us to conclude that Riniker's consent appears to have been freely and unequivocally given.

Therefore, for the reasons described above, we affirm the appellant's conviction.

Affirmed.

PETERSON, Justice (concurring specially).

The critical issue in this case is whether a new trial should be ordered on the ground that defendant's right to a fair trial was violated by the admission into evidence of his confession obtained during a custodial police interrogation without the presence of counsel for defendant.

I agree that defendant did not make a clear and unequivocal request for counsel during the initial interrogation on August 23, which preceded the challenged interrogation in the latter part of the morning on August 24. A *reading* of the typewritten transcript of the taped interrogation of August 23 seemingly indicates such request, but *listening* to the garbled tape itself discloses nuances of equivocal hesitation and tone of voice that persuade me otherwise.

The particular point of my separate statement of views is that, notwithstanding the pointed language of Justice White in *Edwards v. Arizona*, 451 U.S. 477 (1981), forbidding police-initiated interrogation subsequent to a request for counsel, the facts of this case are so distinguishable from those in *Edwards* as not to foreclose a valid waiver even were it to be held that Howard had made an unequivocal request for counsel.

In *Edwards*, the defendant during his initial interview at night made an unequivocal request for counsel. On the following morning, at 9:30, the police came to the jail to interrogate him. He again clearly indicated that he did not wish to be interrogated, but the detention officer nonetheless took him

to the police, stating that Edwards "had to" talk with the police.

In this case, defendant Howard is in a markedly different posture. Howard was neither unsophisticated nor indigent but was a business man presumably acquainted and accustomed to dealing with lawyers. It appears that he had not used the available opportunity to retain counsel. It is clear from this portion of the trial transcripts that he did not wish counsel:

> Q Turning to August 24th, the day that Mr. Rysavy interviewed you, do you admit or do you deny if you were asked by Mr. Rysavy whether or not you wanted an attorney.
>
> A He asked me if I wanted an attorney.
>
> Q Do you admit or deny saying no to him.
>
> A I didn't think I needed one—no.

The transcript of both police interrogations makes abundantly clear the absence of any coercive atmosphere and, indeed, demonstrates commendable police restraint, bordering on solicitude, in dealing with defendant.

This assessment of the particular facts and circumstances of these interrogations is, except for the aspect of police initiation of the second interrogation, in harmony with the Court's opinion in *Edwards v. Arizona*—at least with the understanding of it as articulated in the concurring opinion of Justice Powell, in which Justice Rehnquist joined. Justice White, in the majority opinion, wrote in part:

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts

and circumstances surrounding that case, including the background, experience, and conduct of the accused.' [Citations omitted.]

451 U.S. at 482-3.

[H]owever sound the conclusion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. * * *

[A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation [citation omitted], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-5.

Justice Powell concurred in the court's judgment but did not join in the opinion, "because [he was] not sure what it means" (*id.* at 488),[1] writing:

> In view of the emphasis placed on 'initiation' [citation omitted], I find the Court's opinion unclear. If read to create a new *per se* rule, requiring a threshold inquiry as to precisely who opened any conversation between an accused and state officials, I cannot agree. * * *
>
> Perhaps the Court's opinion can be read as not departing from established doctrine. Accepting the formulation quoted above, two questions are identifiable: (i) was there in fact 'interrogation' [citation omitted], and (ii) did the police 'initiate' it? Each of these questions is, of course, relevant to the admissibility of a confession. In this case, for example, it is clear that Edwards was taken from his cell against his will and subjected to renewed interrogation. Whether this is described as police-'initiated' interrogation or in some other way, it clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel.
>
> But few cases will be as clear as this one. * * *

Id. at 489-90.

> Who 'initiated' a conversation may be relevant to the question of waiver, but it is not the *sine qua non* to the inquiry. The ultimate question is whether there was a

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[1] Chief Justice Burger, likewise concurring only in the judgment, based his concurrence on the fact that when Edwards told the officer that he did not wish to speak to the detectives he was told by the officer "that he had to." "This is enough for me," Justice Burger said, "and on this record the Supreme Court of Arizona erred in holding that the resumption of interrogation was the product of a voluntary waiver * * *." 451 U.S. at 488.

> free and knowing waiver of counsel before interrogation commenced.
>
> If the Court's opinion does nothing more than restate these principles, I am in agreement with it. I hesitate to join the opinion only because of what appears to be an undue, and undefined, emphasis on a single element: 'initiation.'

Id. at 491. The majority opinion did not directly respond to this alternative reading.

My final concern is with this court's alternative opinion that even if the confession obtained at the second, counsel-less interrogation was constitutionally impermissible, its reception into evidence was, beyond a reasonable doubt, without prejudice. The stated reason is that "[i]n the face of the overwhelming evidence [of defendant's guilt], the discovery that a pay-off had been mailed [to accomplice Weber] was a minor addition to the state's case against appellant." This appears inconsistent with the court's opinion in *State v. Caldwell*, —— N.W.2d —— (Minn. 1982) (filed August 6, 1982), in which a new trial was granted the convicted defendant because of inadvertent expert opinion testimony incorrectly identifying a fingerprint as that of the defendant, notwithstanding acknowledgment that it may well be that, upon retrial, the other evidence will prove sufficient to convict him. In my view defendant Howard's confession directly linking his accomplice, Weber, with the murder and making possible the interception of the pay-off by police authorities, was no less critical than the evidence linking defendant Caldwell with the location of the crime. It may be said here, as it was there, that a jury, absent such evidence, "might" have reached a different result. Slip op. at 23-30. The court's opinion reiterated that "to allow factually strong cases to erode

such a basic [due process] right is to deny the existence of the right." Slip op. at 41. The grant of a new trial in Caldwell was based only upon this court's supervisory powers; in the present appeal we are concerned with a more serious issue of constitutional dimension.

AMDAHL, Chief Justice (concurring specially).

I concur in the majority opinion and write only because the special concurrence of Justice Peterson asserts that the majority opinion "* * * appears inconsistent with the court's opinion in *State v. Caldwell* * * *." It seems to me there can be no valid comparison, and thus no inconsistency between admittedly false testimony on a fact of such basic import as the defendant's fingerprints tying him to the locale of the crime, and evidence, as here, the truth of which is not questioned.

KELLEY, J., took no part in the consideration or decision of this case.